

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF PENNSYLVANIA

COZEN O'CONNOR, P.C.,

Plaintiff,

v.

JENNIFER J. TOBITS and  
DAVID M. FARLEY and  
JOAN F. FARLEY, h/w,

Defendants.

Case Number 2:11-cv-00045

Judge: C. Darnell Jones, II

**JENNIFER TOBITS'S NOTICE OF SUPPLEMENTAL AUTHORITY**

Jennifer Tobits respectfully submits this notice of supplemental authority relating to the Court's October 27, 2011 Order requesting briefing on the constitutionality of DOMA. Dkt. No. 55. Ms. Tobits argues that DOMA, by its plain terms, does not apply to the Cozen O'Connor Profit Sharing Plan since the plan is controlled by contract law principles and contains its own definition of the term "spouse." Dkt. No. 73 at 5. Even if the Plan were ambiguous in some way, the doctrine of constitutional avoidance requires the Court to exhaust every other reasonable construction of the statute to avoid adopting a construction that would raise serious constitutional issues. *Id.* If the Court nonetheless determines that DOMA applies to the Plan, as Cozen and the Farleys urge, DOMA violates both the equal protection and due process guarantees of the United States Constitution. *Id.* at 6-33. Ms. Tobits argues that DOMA is subject to, and fails, heightened scrutiny because it discriminates on the basis of sex and sexual orientation, but that the law fails even rational basis review. *Id.*

The recent Southern District of New York decision, *Windsor v. United States*, 833 F.Supp.2d (S.D.N.Y. 2012), supports Ms. Tobits's arguments. In *Windsor*, the court analyzed whether DOMA

violates the U.S. Constitution in a case involving federal estate taxes levied against a plaintiff's same-sex spouse's estate. The court found that DOMA violates equal protection guarantees because it fails even rational basis review, concluding: "The Court declares that section 3 of the Defense of Marriage Act, 1 U.S.C. § 7, is unconstitutional as applied to Plaintiff." *Id.* at 406. Pursuant to "settled principles of constitutional avoidance," the court refrained from considering arguments regarding heightened scrutiny since it could decide the case based on rational basis review. *Id.* at 402 n.2.

Dated: July 13, 2012

Respectfully submitted,

/s/ Amy Whelan

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**CERTIFICATE OF SERVICE**

I, Amy Whelan, hereby certify that a copy of Cross-Claimant Jennifer J. Tobits's "Notice of Supplemental Authority" was served this 13th day of July 2012 upon all counsel via the Court's CM/ECF system. This document is available for viewing and downloading from the CM/ECF system.

/s/ Amy Whelan

Amy Whelan, Esquire